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ABSTRACT

Voluntary bench-bar press guidelines have evolved over the past 15 years as a way of resolving the conflict between the right of the accused to a fair trial and the right of the press to cover such a trial. In 1980, however, a Washington state judge required reporters to sign an affidavit stating that they would follow the state's guidelines. Arguing prior restraint, one paper sued, but lost in the state courts. The Supreme Court refused to review the case. Other journalists reacted angrily to the outcome, seeing the end of the voluntary code system. Originally proposed in response to conviction reversals that stemmed from pretrial publicity, the codes have had a long history marked by controversy; they are often effective, but sometimes ignored by the press, particularly in sensational cases. The Washington state case and other similar cases make the future of such voluntary rules even more doubtful. Still, if the press is to defend its access to the courts, it must not turn its back on the legal sector, but instead should make the effort to communicate its fears and concerns. (JL)

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VOLUNTARY BECOMES MANDATORY?

FREEDOM OF INFORMATION CENTER REPORT NO. 470

This report was written by William Kates, a master's candidate at the University of Missouri School of Journalism.

Voluntary: 1. done, made, brought about, undertaken, etc., of one's own accord or free choice . . . 5. Law. a. acting or done without compulsion or obligation; unconstrained by interference.[1]

The news media and legal profession, including the bench, have worked for nearly two decades to establish mutually agreeable guidelines for covering criminal trials that would guarantee the accused a fair trial without impinging on the rights of the news media to cover such a trial; these are two of the highest protections, both indispensible to representative government and the even-handed administration of justice.

Beneath the development of the factual content of the guideline movement was the premise that any such codes would be subscribed to and observed by the news media on a strictly voluntary basis. The final editorial decision, as insured by the First Amendment, would be left to the news media.

For the most part, it is generally agreed that where guidelines exist they had been fairly effective in accomplishing their dual objectives. And despite the initial clamor and concern on the part of the press that the guidelines would be invoked as a binding obligation preceeding coverage, they had operated rather smoothly except in the most sensational cases. That is until Dec. 17, 1980, when a county court order in the state of Washington shook the press to its very foundations and raised anew the cries of alarm that shrouded the early bench-bar-press conferences.

Whatcom County Superior Court Judge Byron L. Swedberg, in a attempt to limit the potential for prejudicial publicity, required journalists to sign in advance of coverage an affidavit saying they would follow the state's guidelines. The concept of voluntary had taken on a new dimension.

The case began with the arrest of Veronica Compton on Oct. 2, 1980. Compton was reputed to be the girlfriend of convicted slayer Kenneth Bianchi, otherwise known as the Hillside Strangler. The Hillside Strangler was linked to seven strangulations on the West Coast, including two in Bellingham, Wash. Bianchi had been jailed in early September of the same year. In an effort to prove that Bianchi wasn't the Hillside Strangler and that the real killer was still at large, Compton on Sept. 19 tried to murder a Bellingham woman.

The Hillside Strangler murders had gained national exposure. While the thwarted murder attempt by Compton was not of the same grisly magnitude, once the connection became known, it drew equally pervasive publicity.

At the pre-trial hearing on Dec. 17, Compton's lawyers requested the hearing be closed to the press for fear their client otherwise could not receive a fair trial. Swedberg noted that there had already been extensive news coverage of the incident and arrest and that there was a "substantial likelihood" that prospective jurors would read or watch publicity about the evidence disclosed at the hearing.[2]

Suprisingly, Swedberg refused the motion but after questioning the media representatives regarding their familiarity with the state's bench-bar-press code, he conditioned their attendance on the signing of an agreement form drafted by the prosecutor that stated they would follow the guidelines in their coverage.

Swedberg justified his decision by saying uncontrolled publicity would prejudice the defendant's right to a fair trial and that no other alternative to complete closure, other than partial closure, was feasible.

Summary

Voluntary bench-bar-press guidelines, which have evolved over the past 15 years, have represented efforts on the part of judges, attorneys, law enforcement officials, and the press to resolve the fair trial-free dilemma. A ruling by a judge in the state of Washington has, however, raised the question of just how voluntary these guidelines really are.

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Swedberg later said, in the brief filed in opposition to a newspaper's certiorari request to the state supreme court, that he was "simply trying to fashion a remedy less severe than closure that would allow media attendance."[3] He said the condition he imposed "was essentially an appeal to professional media ethics and was rationally connected to preservation" of the accused's constitutional rights.[4] Additionally, the judge said he was asking the news media to agree to nothing more than they had already agreed to through their subscription to the code.

Most of the reporters had no problems with Swedberg's request and signed the agreement. Several reporters, however, including one from the Bellingham **Herald** (owned by Federated Publications, Inc., a subsidiary of Gannett Co., Inc.), refused to sign.

Charles Wanniger, then editor and publisher of the Bellingham newspaper, explained his reporter's actions by saying: "It was more a matter of principle than anything to do with guidelines specifically. If they are voluntary, which they ought to be, then they should not be incorporated into a judicial order."[5]

The paper charged that by making adherence to the guidelines mandatory as a prerequisite to covering the trial the court was, in effect, establishing conditions for publication. To Wanniger and the **Herald** that meant prior restraint.

Although the judge said that any reporters who did not sign the agreement would be refused admittance to the trial in a professional capacity, it was later ruled that he had no authority to issue a contempt order if indeed a reporter who had refused to sign the argeement covered the trial.

But as Wanniger pointed out, this fact was not known until after the state supreme court's review. "We felt that inherent in the order was the implied threat of a contempt of court" finding, he said.[6]

Rather than risk the contempt charge and believing it was on good legal and ethical footing, the newspaper appealed Swedberg's decision to the Washington Supreme Court. Much to the newspaper's chagrin, the court, in a 5-4 decision, twice reaffirmed the lower court's approach — once in the original appeal and a second time following a reconsideration motion by the **Herald**.

The state's high court, basing its decision on the U.S. Supreme Court 1980 decision in Gannett Newspapers v. DePasquale, said the lower court could have closed the hearing to "insure that the fairness of trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has begun."[7]

The court, in so many words, applauded Swedberg for an innovative approach to a difficult problem, balancing the rights of the press and the accused. It said:

> The exaction of an agreement to abide by standards which have gained the approval of all the media of mass communication in this state was not unreasonable, particularly in view of the fact that the commitment is a moral one, even when expressed in writing, and unenforceable in a court of law.[8]

The court added:

> As we view this measure, it was a good faith attempt to accommodate the interests of both the defendant and the press which, hopefully, would prove both practical and effective as an alternative to closure.[9]

In addressing the problem of fair trial-free press, the U.S. Supreme Court has said judges should look to alternative recourses other than closure for protecting the rights of the accused. Among the choices suggested were sequestration of the jury, questioning of prospective jurors, change of venue, delay of trial and admonition of jurors.

Under its own holding in Federated Publications v. Kurtz, the court said closure may be ordered upon a showing that there are no "acceptable and practical" alternatives to closure. In this case, Swedberg had found no choices other than the written agreements feasible, the court said.

It found specific faults with all the alternative measures and said "Those alternatives all involved some compromise of a right of interest of the accused or the state. None of the suggested alternatives involved the exercise of some restraint on the part of the media."[10]

The court repeated Swedberg's logic that partial closure was better than closing off the courtroom entirely to the news media. The majority noted that the guidelines were commonly adhered to with the proper caution and restraint by the press but that "it had been the experience of the trial judge (here) that mere oral commitment had not sufficed to producing the restraint. Even with written agreement the defendant's interests were placed in some jeopardy. Yet he (Swedberg) did experiment so both rights could be served."[11]

Wanniger did admit that the **Herald** had "inadvertently violated" the guidelines on a few occasions but still questioned the propriety of making journalists pledge in writing their adherence to the code.[12]

The dissenting minority also questioned the propriety of the majority's decision. "It is not a reasonable condition for admittance to a courtroom for a judge to limit what a newspaper may print or television (station) may broadcast."[13]

Since the case was similar to the circumstances that existed in the Nebraska Press Association v. Stuart decision handed down by the U.S. Supreme Court in 1976 — or so the newspaper and its attorneys thought— the **Herald** used it as the core of its argument.

The Nebraska Press Association case involved the closing of a criminal trial in a small Lincoln County, Neb., community following the mass murder of six members of a local family. In an effort to protect the defendant from prejudicial publicity, the judge ordered the suppression of all testimony and evidence from public dissemination and required members of the press to observe the state's bar-bench-press guidelines. The U.S. Supreme Court, noting a "heavy burden" against restricting the press' right of coverage, called the order unconstitutionally vague and an unacceptable prior restraint on the news media.

Justice Blackmun commented directly to the point of guidelines in his opinion granting a stay of the lower court's findings. He said:

> The most troublesome aspect of the District Court's restrictive order is its wholesale incorpora-

> tion of the Nebraska bench-press guidelines for Disclosure and Reporting of Information Relating to Impending Criminal Litigation . . . it is evident that they constitute a 'voluntary' code which was not intended to be 'mandatory.' Indeed the word guidelines itself so indicates. They are merely suggestive.[14]

The Washington court, however, summarily dismissed any relationship between Nebraska Press Association and the Swedberg ruling by saying ". . . we are convinced that the order of the court did not involve a prior restraint upon the exercise of free speech. There was no prohibition of publication or other communication of events which transpired in the courtroom."[15] It offered no further explanation for its decision.

The results at the last judicial stop, the U.S. Supreme Court, did not leave the **Herald**, or the news media in general, for that matter, with any better feelings.

"We were very frustrated by the court's decision," said Wanniger after the Supreme Court refused to review the Swedberg ruling. "We thought we had a good case."[16] Only Justices Brennan and Marshall thought the issue was compelling enough for the Court's attention.

Others did not couch their disappointment, or irritation, in such diplomatic terms.

James Goodale, former counsel for the New York **Times** and a well-respected media attorney, called the decision "a cruel lawyer's trick played on the press."[17] He described Swedberg as a "major setback" in the area of bench-bar-press cooperation and said "it is clear that any press organization that has agreed to free press-fair trial guidelines must take steps to protect itself from Swedberg."[18]

Jack Landau, executive director of the Reporter's Committee for Freedom of the Press, predicted Swedberg will have a "devastating impact on the decade-long movement to develop communication between the judiciary and the press."[19]

Landau told a meeting of the American Society of Newspaper Editors that "if the Supreme Court left standing the Washington state decision . . . the trend toward cooperative guidelines is virtually dead as far as the press is concerned."[20]

New York **Times** executive editor Abe Rosenthal told the same group that if voluntary ethical codes could be made mandatory, then the danger was potentially great the could be forcibly used against the press in other types of news coverage.

Rosenthal added "the Supreme Court action . . . will discourage press efforts to raise the general standards of news reporting — exactly the opposite long-term impact one would think the court wanted to achieve."[21]

Local media also lambasted the nation's high court for its failure to solve an issue that most believe will resurface.

Jerry Zubrod, executive director of the Washington Newspaper Publishers Association, said "Quite a few of our people were certainly disappointed. Some of them didn't really like the damned guidelines to begin with — they thought they were a shackle."[22]

Don Pember, director of the School of Mass Communications at the University of Washington in Seattle — and a member of the conference that drafted the state's original guidelines — summed up the feelings of many journalists by saying "The whole guideline concept was based on trust, and this trust has been broken by the Swedberg case."[23]

Criticism of the Supreme Court's lack of action has not been entirely one-sided, although the only real show of displeasure has come from the American Bar Association's task force members who joined with the press in several resolutions condemning the decision. The most recent resolution said the legal body "regrets the Court's not taking the case on for consideration," according to a spokeswoman for the American Newspaper Publishers Association, which joined in the resolution.[24] The resolution urged that in the future judges not use the guidelines in a mandatory fashion against the press.

Ironically, the Court based its decision to forgo review of the case on language advanced in the Richmond Newspapers v. Virginia case heard in 1981 that said "reasonable" limitations could be imposedupon publicity at a judicial proceeding. The irony is that the Richmond case was viewed by many as a victory for the press. The decision clarified the earlier Gannett ruling which lower courts had interpreted as giving them broader authority to close courtrooms from media access. Richmond reestablished the heavy burden presumption and advocated the alternative choices first elaborated on in the Nebraska Press Association decision.

The Court simply sided with the arguments presented by the state (representing Swedberg) that the news media's wounds would have "been all the more severe had the court taken the only other alternative open to it in view of its findings, that of closure of the proceedings entirely."[25]

The defense lawyers in the Swedberg case said the mechanism selected here by the judge to insure that both First and Sixth Amendment rights were not violated was the "conscience and responsibility of the media which attended the proceedings." And the Supreme Court agreed that such a mechanism did not constitute prior restraint.

About the only positive thing that can be drawn from the Supreme Court's inaction from the news media's perspective is that as a result the decision is binding only in Washington and that it fails to establish a federal legal precedent. It is little compensation to the press, though, as other states will no doubt perceive the inaction as an endorsement of making written agreement with the guidelines a condition of access.

To understand the dangerous ramifications the decision might have, it would do well to briefly review the long struggle to develop the codes.

The ABA Legal Advisory Committee on Fair Trial-Free Press, in a report drafted in 1974, recognized three key developments in the history of guideline formulation. Other students of the movement commonly subscribe to the same trichotomy.

The committee listed the Warren Commission report of 1964, which called upon the press, the bar and law enforcement officials to devise such standards in the wake of the assassination of President John F. Kennedy and the murder of his alleged assailant, Lee Harvey Oswald; a series of decisions by the U.S. Supreme Court which focused national attention on the dangers of prejudicial publicity in the administration of criminal justice; and the adoption in 1968 of the ABA's standards relating to fair trial-free press.[27]

The Warren Commission's purpose was to investigate the slaying of the president, but the haphazard coverage of the incident by the news media spurred the panel to comment on the need for reforms.

The commission said the news media "subjected Oswald to harassment and created chaotic conditions which were not conducive to . . the protection of the rights of the prisoner," and that the coverage "would have presented serious obstacles to the obtaining of a fair trial for Oswald."[28]

The final recommendation presented in the report was a response to the news media's poor performance. The press, judges and lawyers, it said, should "work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings or the right of individuals to a fair trial."[29]

The series of U.S. Supreme Court decisions referred to by the bar association committee all occurred during the first half of the 1960s, although the Nebraska case, which occurred in 1976, is equally significant. That case refocused attention on the fair trial-free press dilemma at a time when the problem seemed to be under control and prompted revisions of the standards and renewed reticence on the part of the press to participate in them.

In 1961, the U.S. Supreme Court, for the first time, reversed a state conviction solely on the grounds of prejudicial pretrial publicity. The case was Irwin v. Dowd and the majority opinion, written by Justice Tom Clark, cited the pattern of deep and bitter prejudice that permeated the community as a result of the news media's coverage.

The Court, two years later in Rideau v. Louisiana, chastised broadcasters for televising a defendant's confession to bank robbery and murder three times and reversed the conviction on the grounds of denial of due process.

By far, the most important cases to add to the development of the standards were the Estes v. Texas decision in 1965 and the Sheppard v. Maxwell ruling in 1966.

Billy Sol Estes was a Texas financier convicted in that state on swindling charges. Because of Estes' wealth and strong influence in state and national politics, the case drew nationwide attention that culminated with the televising of the actual trial.

In a 5-4 decision, the Court reversed the conviction. Justice Clark, again speaking for the majority, said the interjection of television into a judicial process posed a grievous threat to a just determination of innocence or guilt. He said television had an infectious impact on the participants in the trial, caused considerable distraction to both witnesses and jurors, and impaired the effectiveness of the judge, especially an elective one concerned with the political capital to be gained by such exposure. Justice Clark added that the defendant might also suffer from "a form of mental harassment resembling a police lineup or the third degree."[30]

One year later, the Court reversed another murder conviction citing the "Roman holiday" and "carnival" atmosphere created by "circulation-conscious editors catering to the insatiable interest of the American public in the bizarre."[31]

The case stemmed from a 1954 murder in which Dr. Sam Sheppard was alleged to have bludgeoned his wife to death in their suburban Cleveland home. The press was blatant in its disrespect for the accused's right to a fair trial. It ran front page editorials suggesting Sheppard's guilt, it conducted man-on-the-street polls and published them, it publicized the names of prospective jurors, and it aired live debates about the trial while jurors were being selected.

These last two cases were major catalysts in the joining of the principal characters for the purpose of developing reporting standards. The news media had not been proud of its role in these incidents and others like them and despite the fear of being restrained in their ability to report, they conceded that steps were necessary to control the coverage of criminal investigations and judicial proceedings.

Justice Paul C. Reardon of Massachusetts headed a ten-member committee of lawyers and judges that examined the fair trial-free press question. The report, approved by the ABA as a whole in 1968, made recommendations that were eventually used as the core of most press-bar agreements. The committee recommended the suppression of such information as the prior criminal record of the accused, existence of a confession, names of prospective witnesses, speculation of a possible plea and interviews or photographs obtained without the consent of the accused.

As might be expected, the press initially protested the imposition of any guidelines or standards. Many judges and prosecutors also felt the ABA's recommendations were too strict. An ANPA news release commented harshly on the report and its suggestions. It said "The people's right to a free press, which inherently embodies the right of the people to know, is one of our fundamental rights and neither the press nor the bar has the right to sit down and bargain it away."[32]

Whether it was a renewed dedication to providing fair coverage, or the threat that if the press did not restrain itself the court would, the press finally did sit down with the bar to negotiate some type of guidelines. Before and throughout the negotiations, the press' major reservation was that if it did agree to follow guidelines they might someday be applied in an obligatory manner.

The joint task force was never able to develop guidelines with universal acceptability but it was able to persuade many individual states to develop their own respective guidelines using its recommendations as a base.

The 1974 ABA study presented what it had found to be the most common components of a composite picture of the guidelines in effect at the time.

The report said the following information should generally be made public:

- The accused's name, age, residence, employment and marital status and similar background information.
- The substance of text of the charge.
- The identity of the investigating or arresting agency and the length of the investigation.
- The circumstances surrounding the arrest, including the time, place, resistance, pursuit, possession and use of weapons and a description of the items seized.

The report said the following information should **not** be made public:

- Any statement as to the character or reputation of the accused.
- The existence or contents of any confession, admission or statement given by the accused person, or his or her refusal to make a statement.
- The performance of the accused during, or the results of, any tests, or the accused's refusal to take such tests.

- The expected content of testimony or the credibility of any prospective witnesses.
- The possibility of a plea of guilty.
- Any statements relating to the merits of evidence, arguments, opinions or theories of the case.[33]

The guidelines contained both dos and don'ts.

> The agreement specifies the ethical obligations of lawyers, for both prosecution and defense, not to release such information for publication. On the part of the news media, the agreements assert a responsibility of editors and reporters voluntarily to avoid publication of prejudicial material.
>
> In the interest of press freedom, the agreements make it the duty of law enforcement officials to release for publication promptly defined categories of nonprejudicial information about criminals, criminal investigations, arrests, evidence seized and scheduling of court proceedings. As in the case of the ABA standards themselves, this emphasis on the right of media access to criminal news is intended to prevent misapplication of the agreements as a cloak for unwarranted official secrecy inconsistent with the public interest and the spirit of the agreements.[34]

Unfortunately for both sides, the press was not included in the development of the standards advanced by the ABA or the group might have been able to come up with a code agreeable on a national level. Instead, as was mentioned previously, the ABA standards were negotiated on a state-by-state basis. The process was arduous but one by one statewide bench-bar-press conferences were formed on a continuing scale and codes were set forth that began to attract sizeable numbers of journalists.

Still, in 1981, after nearly 20 years of bargaining and bickering in backrooms and on the public stage, only a few more than half the states had promulgated guidelines that suggested limited news reporting of evidence and confessions until they were admitted during trial.

The states with some type of news coverage guidelines include: Alabama, Arizona, California, Colorado, Delaware, Georgia, Idaho, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and Wisconsin.

Participants in the agreements and outside evaluators have not been able to reach a consensus on how successful the conferences and agreements have been in protecting the accused from a hype-hunting press or the press from a secretive and censorial law enforcement and judicial system.

As early as 1970, Robert Fichenberg, a journalist and mass communications scholar, said "As a result of the guidelines in the state of Washington and in other states where this approach is in effect, there has been a change in attitudes, for the better."[35]

The 1974 ABA report concluded that "a majority of newspaper editors, radio and television news directors and bar association officials find the agreements are effective in helping to protect guarantees of fair trial and free press in crime news reporting."[36]

Citing statistics from a survey it conducted in conjunction with the ASNE and the Radio and Television News Directors Association, the ABA said the agreements were favored seven to one by newspaper editors, two to one by radio and television news directors and three to one by legal respondents.

A more scholarly review of the effectiveness of the agreements was done in 1979 by James W. Tankard Jr., Kent Middleton and Tony Rimmer. Using data gathered from a content analysis of 29 newspapers during a five-week period, they found a 1.13 (out of a possible 6.0) violation rate of the standards with violations occurring in 67.7 percent of the stories they analyzed. The rate of violations was higher than the 1974 ABA report would lead one to expect, the study said.

On the plus side, however, the study found that the two kinds of material thought to be the most damaging to an accused person — the reporting of confessions and previous records — had two of the lowest rates of violation. Only the reporting of test results occurred less frequently.

The study did not acknowledge if any major crime news stories were included and this, according to Wanniger and other critics of the codes, is where the guidelines break down.

"The guidelines work well in routine cases, but break down in the sensational ones like the Reagan assassination," Wanniger said.[37]

There are many other incidents that lend support to that contention: the coverage of the Atlanta child murders and the subsequent arrest and trial of Wayne Williams; the case of Mark David Chapman, the convicted slayer of John Lennon; the case of Craig S. Crimmins, the stagehand convicted of murdering a violinist at the Metropolitan Opera House in New York City; the trial of millionaire Claus von Bulow for the alleged attempted murder of his wife; and the arrest on drug trafficking charges of sportscar designer and manufacturer John DeLorean.

The most recent incident of the news media violating the guidelines came with the arrest of Kevin Masterson, a suspect in the Tylenol murders which took the lives of seven people in the Chicago area. Masterson was arrested in California on a fugitive warrant from another state in which he was wanted on drug charges. At least two of the major networks, however, reported his arrest for the murders. Although Masterson was a major suspect in the case, police stated they wanted him for questioning only at the time. Those same networks also provided comment from psychiatrists as to Masterson's mental instability and potential for violent behavior, adding further to the prejudicial context of their reports. The latter instance was a direct violation of the standards.

Press critics repeatedly ask how voluntary guidelines can succeed if journalists reserve the right to violate them at will. These critics are not imagining a problem. James R. Minter, executive editor of the Atlanta **Journal** and **Constitution**, said in a New York **Times** interview that his newspaper decided alone what information to publish about the Williams case — and Georgia is one of the states that has a press-bar-bench code.

In New York, where a code exists, the New York **Daily News**, the New York **Times** and just about every major news organization, reported that Crimmins had made a videotaped confession of guilt in the murder of the violinist.

The existence of a confession is one of the foremost types of prejudicial information listed in the codes. Yet how many other of that city's murders are reported on in a reasonable manner with no mention of the existence of a confession or other prejudicial information?

What has been gained during the past 20 years in the area of press-bar agreements is little in comparison to the time and effort funneled into the fair trial-free press quagmire. And now the future appears shadowy, although the news media still attest to a willingness to continue the dialogue that has been established with the bench and bar.

Without doubt, Swedberg has created a major schism that must be transcended before any more progress on the fair trial-free press front can be expected. On this the news media uniformly agree. An amici curiae brief filed with the U.S. Supreme Court by several national and regional news media organizations said the Swedberg ruling "threatens to destroy the results of twenty years of cooperative efforts."[38]

What the Swedberg decision has done is turn the conceptual paranoia of the news media into a tangible and frightening reality and the reaction has been unsurprisingly swift and direct.

Even before the U.S. Supreme Court announced the final verdict on Swedberg, the ASNE circulated a memorandum recommending that "editors in the 28 states with guidelines reexamine their participation in such formal agreements" and urging "editors to amend voluntary guidelines so they clearly state they will not be used by the court in any fashion to impose prior restraint or condition access to judicial proceedings."[39]

The ANPA called for similar review among its membership and urged the inclusion of "specific language in a conspicuous place" in the agreements that would indicate the guidelines could not be used as a condition of access.[40]

Both groups, while stressing re-evaluation of the agreements, also have encouraged continuation of communication with judges and lawyers in order to preserve what has been gained and, hopefully, to maintain a framework for future improvements. The news media groups, though disturbed with current events, are still supportive of the principle and the need for protecting the rights of the accused.

The Swedberg decision has its most direct relationship with the print media, particularly newspapers, but broadcast media have been equally vocal in their displeasure and ominous prognostications.

Steve Nevas, First Amendment counsel for the National Association of Broadcasters, said the decision "invites mimicry by other states" and that "relations between the bar and the press may once again become those of adversaries, rather than those which enlighten and sensitize each profession to the concerns of the other."[41]

Wayne Godsey, president of RTNDA, called the decision "a regrettable distortion of the results of a long and positive effort on the part of the news media to reach an accommodation with lawyers and judges on many difficult constitutional questions."[42]

He added that the ruling "might jeopardize years of work . . . to achieve a mutual understanding of the conflicting needs of the news media in providing the information the public must have and the needs of the bar and bench in providing the proper environment for a fair trial."[43]

Actually, Swedberg has left the news media in a state of confusion. No single agreement has collapsed since the courts handed down their opinions, but many individual newspapers and organizations have withdrawn their support. In the state of Washington, for example, the Seattle **Post-Intelligencer**, Allied Daily Newspapers (a trade association of 53 newspapers in Washington, Oregon, Alaska, Montana and Idaho), the Washington Newspaper Association (comprised of 123 newspapers within the state) and the Washington State Association of Broadcasters all have withdrawn their approval of the bench-bar-press code in order to forestall its use by other judges in the same manner it was used by Swedberg.

"A publisher's resignation," says James Goodale, "would effectively prevent a judge from saying to a reporter . . . 'Your newspaper agreed to these guidelines, and so if you want to listen to this criminal case, just sign on the dotted line agreeing to these guidelines.' No guidelines, no dotted line."

He added, though, "Resignation will not, however, make free press-fair trial problems go away. The debate will continue and the only question is whether the press wishes to be part of it."[44]

A movement also is underfoot in Washington, New Jersey and several other states to redraft the agreements. Two considerations are being concentrated on – omitting the specific provisions and singling out in very concise language that the guidelines are voluntary and cannot be used against a reporter to bar him or her from a judicial proceeding (the ANPA/ASNE alternative). Regarding the proposal for rewriting the agreement in vaguer terms and stressing instead basic principles, Wanniger voices the response of many: "How is that going to help?"[45]

If there are no specific provisions the guidelines essentially would be worthless. It would present a situation similar to what exists where there are no guidelines; ambiguous language would provide great latitude and news organizations would be left to their own moral and professional consciences in covering news of crime and judicial proceedings – and history has shown where that path leads.

The second measure appears more logical. If a judge decided upon a tactic similar to Swedberg's, the reporter could then pull out a copy of the local code and say: "You can't force me to sign these guidelines. They explicitly state they can't be used against me."

The choice is up to the media, individually and collectively, as to what avenue to take. But as Goodale notes, "the press is better of participating in a discussion . . . rather than resigning from it."[46]

The ANPA spokeswoman said that although that organization has not conducted any overview study on the effects of the ruling, it was the association's general feeling that despite the initial (and warranted) outrage expressed by the news media, many states have taken the position that the ruling is a local situation and applicable only in Washington. While they are expressing concern and displaying a more cautious approach to their own conferences, many states do not wish to jeopardize the gains they have made for themselves, she said.

Despite contentions by some members of the news media that publicity does little to influence jurors' decisions, it is

unarguable that in many instances (e.g., the Wayne Williams case), the press has acted, if not in an unfair manner, certainly in an unprofessional one.

The guidelines, while not originally developed by the news media, have in recent years had much input from the media. Any guidelines can be construed as censorship, but as in the fair trial-free press question, they are sometimes necessary.

The press is not reneging on its responsibilities if it does not publicize what John Doe, the psychiatrist, has to say about an accused person or by not telling the public of the accused's past record. What it is doing is acting in a just and sensible fashion, many would argue. This does not require an oral or written pledge, but merely a consistent commitment in everyday endeavors.

Goodale argues the press cannot afford to withdraw from the dialogue in lieu of the Swedberg ruling. The decision, unfortunately, is not an aberration. Access to courts has again become a sore point. Though Swedberg is the only instance to date where a judge has incorporated written agreement with bench-bar-press guidelines as a condition of access, the frequency of closure of courtrooms for other reasons and in other ways is growing.

Following the Supreme Court ruling in Gannett, open government watchdog groups reported somewhere in the neighborhood of 200 criminal pre-trials and trials were shut off to the press in the course of one year. The Richmond decision has mitigated that trend but the news media still face major challenges.

On the same day it decided not to hear the Swedberg case, the U.S. Supreme Court also voted not to review a case involving the Sacramento **Bee**. That newspaper had been excluded from a suppression hearing involving a drug trafficking case. The U.S. Court of Appeals in San Francisco acknowledged that a district court had erred in excluding the press but not the public from the trial. But the appelate court, saying "the error was insufficient to justify directing the trial judge not to issue further closure orders," suggesting the press should have sought a "voluntary agreement" regarding the timing and the scope of the coverage.[47] The news media considered this a request for self-censorship.

The press cannot afford to turn its back on the conferences because of cases like Swedberg and the Sacramento **Bee**. When communication breaks down, estrangement follows. The only way to avoid that and impress upon the legal sector the news media's concerns and fears is to keep the channels of communication open and functioning.

FOOTNOTES

1. **Random House Dictionary**, College ed. (1968), s.v. "voluntary."
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5. Interview with Charles Wanniger, William Allen White School of Journalism, University of Kansas, Lawrence, Kan., 22 Nov. 1982.
6. Ibid.
7. 5 **News Media and the Law** (Oct./Nov. 1981): p. 50.
8. 7 **Med. L. Rptr.** 1868.
9. Ibid.
10. Ibid., at 1866.
11. Ibid., at 1868.
12. Wanniger.
13. 5 **News Media and the Law** p. 50.
14. 1 **Med. L. Rptr.** 1063.
15. 7 **Med. L. Rptr.** 1867.
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19. **Editor & Publisher** 115 (22 May 1982): p. 11.
20. **Portland Oregonian**, 24 May 1982, p. A6.
21. Ibid.
22. **Publishers Auxiliary** 117 (31 May 1982): p. 16.
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31. **Ibid., p. 88.**
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33. **Fair Trial-Free Press Voluntary Agreements**, pp. 7-8.
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39. American Society of Newspaper Editors news release, 4 May 1982.
40. Riley.
41. "Voluntary Guidelines on Court Coverage Cause Stir," **Broadcasting** 102 (4 Jan. 1982): p. 87.
42. Radio and Television News Directors Association news release, 12 June 1982.
43. Ibid.
44. Goodale, p. 23.
45. Wanniger.
46. Goodale, p. 23.
47. 6 **News Media and the Law** (June/July 1982): p. 11.

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